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1 [The R.M.C. 806 was called to order at 0911, 13 June 2019.]

2 MJ [CAPT LUKEN]: This Military Commission is called to
3 order. This session has been closed pursuant to Military
4 Commission Rules of Evidence 505(h) [sic] for the purposes to
5 determine the use, relevance, and admissibility of classified
6 information by the defense and the government.

7 Actually, this isn't 505(h). We've already had that
8 session of court. So this is just part of the regular session
9 of court, but it is closed at this time.

10 Trial Counsel, will you please account for the members
11 that are present at your table?

12 TC [CDR TREST]: Yes, Your Honor. Commander Trest,
13 Lieutenant Commander Roman, Captain Flanagan, Special Agent
14 Hodgson, and LN1 Passwater. And we all have the clearances that
15 are required to be in this -- to be in this session, Your Honor.

16 MJ [CAPT LUKEN]: All right, thank you.

17 And Defense?

18 DC [MS. MCCORMICK]: I'm Mary McCormick, Your Honor. With
19 me is Captain Mizer, Ms. Annie Morgan, Staff Sergeant [REDACTED]
20 and we are all properly cleared for this session.

21 MJ [CAPT LUKEN]: All right, thank you.

22 All right, Counsel, do you want to do documents first,
23 or do you want to do evidence first? Government?

24 I'm sorry, or testimony first, I forgot to say.

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1 TC [CDR TREST]: Yes. Yes, sir. We can call Special Agent
2 Hodgson.

3 MJ [CAPT LUKEN]: Okay. Your witness, so.

4 DC [CAPT MIZER]: Judge, just to alert you, I think that we
5 have an outstanding discovery issue. The government's looking
6 through the discovery that was provided to us. But we weren't
7 able to effectively communicate yesterday, being in here without
8 a SCIF, about whether one of the cables in the reply that we
9 mentioned was in fact provided either in itself or derivatively.

10 MJ [CAPT LUKEN]: Yeah and that was discussed yesterday a
11 little bit.

12 So have we come to resolution there, or what's the
13 status of that?

14 TC [CDR TREST]: Sir, we -- well, one of the cables they
15 agree that we have turned over, which was the first one that was
16 attached, the IIR. And the second one, I have Lieutenant
17 Commander Roman that can talk to that, but although that
18 physical cable wasn't turned over, we believe the information
19 contained in that cable was provided to the -- Captain Mizer.

20 MJ [CAPT LUKEN]: All right.

21 TC [CDR TREST]: Would you like to hear from Lieutenant
22 Commander Roman at this time, sir?

23 MJ [CAPT LUKEN]: Please. Please.

24 ATC [LCDR ROMAN]: Permission to use the well?

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1 MJ [CAPT LUKEN]: You may.

2 All right, so let me start off. What's the name of
3 the document that defense has as a cable -- dated when?

4 Defense?

5 DC [CAPT MIZER]: Sorry, Judge; [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 MJ [CAPT LUKEN]: Okay.

9 ATC [LCDR ROMAN]: Sir, it's the government's contention
10 that this is -- that this information is not only stale in the -

11 [REDACTED]
12 [REDACTED] it is also cumulative and non-helpful under the 505
13 process that this -- that this attachment circumvent; meaning
14 that it's non -- that it is cumulative. Everything that is
15 included in this cable, including -- and in talking with defense
16 counsel, we've kind of honed it in on [REDACTED]

17 [REDACTED]
18 [REDACTED] which as you heard
19 before has been dissolved. That's Lieutenant Colonel Corcoran's
20 testimony that that doesn't exist anymore, today. But in 2012,
21 when Mr. al Qosi was repatriated, the information is that there
22 was going [REDACTED]
23 [REDACTED]

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[REDACTED]

But if we are going back and looking at things contemporaneously with this

[REDACTED] we were providing -- we did provide the defense, again, with a [REDACTED]

[REDACTED]

[REDACTED] is no longer relevant, necessary, and helpful to the defense. We provided them with many pages of more information that is cumulative to what they are asking or seeking that should have been discovered.

Further, [REDACTED]

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[REDACTED]

It was

also produced prior to that in the -- in the State Department
diplomatic notes that were disclosed,

[REDACTED]

Post rehabilitation center plans;

[REDACTED]

MJ [CAPT LUKEN]: So what I'm hearing here is that while
that particular cable was not turned over to the defense, the
material and the information that is part of that cable was
provided elsewhere to the defense?

ATC [LCDR ROMAN]: Yes, Your Honor. And they ----

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1 MJ [CAPT LUKEN]: So defense has this -- has had this
2 document, however they got it.

3 Was it the government's position at any time -- did
4 you identify this document and decide, "Eh, we don't need to
5 turn this over," or was this simply you didn't realize you
6 didn't have it or is it, as part of big government, had it but
7 little government sitting at table didn't have that document?

8 ATC [LCDR ROMAN]: I mean, that question goes back to -- we
9 will have to look at what the -- the reasoning then, but the
10 reasoning as the government right now is stating is that this
11 doesn't meet a threshold for discovery in that it ----

12 MJ [CAPT LUKEN]: What I'm wondering is if you, you, little
13 G, made a decision not to turn over documents that you had, to
14 include this cable?

15 ATC [LCDR ROMAN]: One moment, Your Honor.

16 **[The Assistant Trial Counsel conferred with his team.]**

17 ATC [LCDR ROMAN]: Your Honor, standing here today, I don't
18 have the recollection of that particular document. We received
19 reams of documents on requests from multiple different agencies
20 that we reviewed to find things that were material to a defense,
21 and the government would contend that there is nothing that puts
22 the defense in ----

23 MJ [CAPT LUKEN]: I understand.

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1 ATC [LCDR ROMAN]: ---- a poor -- a worse position, because
2 of this inaccurate, cumulative document.

3 MJ [CAPT LUKEN]: Okay. I got it. Just work with me,
4 please.

5 ATC [LCDR ROMAN]: Yes, sir.

6 MJ [CAPT LUKEN]: I'm trying to understand to the degree,
7 if any, there was a discovery violation here.

8 ATC [LCDR ROMAN]: Uh-huh.

9 MJ [CAPT LUKEN]: Is this a case where you have five
10 documents, and you go, "You know what? I'm just going to turn
11 over these three, because they don't need these two," or is this
12 more of, "Hey, we have five documents. They are material.
13 We'll turn over the five," and then defense goes, "Hey, what
14 about number six? We found six," and you're like, "Oh," and you
15 go look for like -- you find six somewhere else.

16 See, there's a conscious decision between the first
17 scenario verses the second scenario.

18 ATC [LCDR ROMAN]: Yes, sir.

19 MJ [CAPT LUKEN]: That's what I'm trying to understand.

20 ATC [LCDR ROMAN]: Well, I don't think we can -- I don't
21 think I can answer that today from my recollection and how this
22 particular cable came -- came about.

23 MJ [CAPT LUKEN]: Did you have this cable in your discovery
24 logs?

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1 ATC [LCDR ROMAN]: Well, again if -- at this time we are
2 not able to go through our discovery logs and the different
3 places that -- I mean, we're -- we're in the courtroom.

4 MJ [CAPT LUKEN]: Counsel, I would expect that if defense
5 files a motion saying that you had a discovery violation and
6 here is a document, I don't know, I'd probably go back and look
7 at my logs and documents to see if I had that document. But
8 what you are telling me here is that you haven't even done that.

9 Is that your position?

10 ATC [LCDR ROMAN]: Your Honor, we went through our
11 discovery log, and we determined that this -- that their
12 argument does not put them in a -- in good conscience, they
13 can't say that they are in a worst position, because of its
14 cumulative nature.

15 MJ [CAPT LUKEN]: All right, Counsel. Thank you for your
16 argument. I understand. Have a seat.

17 ATC [LCDR ROMAN]: Yes, sir.

18 **[The Assistant Trial Counsel did as directed.]**

19 MJ [CAPT LUKEN]: I'm a little disappointed in the position
20 you are taking.

21 All right, Defense, it seems like the door's open,
22 now.

23 DC [CAPT MIZER]: And, Judge -- look, we've had difficulty
24 discussing this with the -- with the government. It could be

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1 something that they need to answer, if they go back and take a
2 look at -- at their records. But look, we do believe that this
3 is relevant. I mean, one of the huge issues in this case is, in
4 fact, notice.

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 MJ [CAPT LUKEN]: Okay. Just so -- the fact that whether
12 [REDACTED] is relevant. The question
13 though posed back to you though, is: Through the other
14 discovery and information that you had though, does this -- by
15 not receiving this particular document, how does this put you in
16 a different place than if they had turned over this document?

17 DC [CAPT MIZER]: I think it goes to the notice question
18 before -- before the Commission, Judge. Look, I mean, you are
19 going to hear, potentially, Special Agent Hodgson talk about

20 [REDACTED]
21 [REDACTED] The problem with
22 those documents, as we've alluded to before, is those are
23 sometimes double, triple, quintuple hearsay through a liability
24 we have no idea about. [REDACTED]

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3 That's hardly reliable evidence, Judge. And we want to be able
4 to and should have been able to, both with Colonel Corcoran and
5 to the Commission, to argue, [REDACTED]

6 [REDACTED] I mean, that's -- that's where we are,
7 Judge. I mean, they painted a picture in the very first session
8 of this Commission that they essentially when down to [REDACTED]

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11 "No."

12 Well, come to find out [REDACTED]

13 [REDACTED] I mean, the questions that they asked are

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16 What about the folks that are there?

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19 MJ [CAPT LUKEN]: But that also goes back to when those
20 elements were there. I'm not so sure that they're there today
21 or have been in the last few months.

22 DC [CAPT MIZER]: And I would disagree with that, Judge.

23 MJ [CAPT LUKEN]: Okay.

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1 DC [CAPT MIZER]: Colonel Corcoran said nothing yesterday
2 about [REDACTED]. What he talked about was a coup at
3 the top; two coups, and we completely agree with that, at least,
4 consistent with the reporting in the *New York Times*. But all of
5 that apparatus, including the rapid security force, which is
6 allegedly headed by some nasty thug, who's also an international
7 fugitive, like the president ----

8 MJ [CAPT LUKEN]: Your words, not mine.

9 DC [CAPT MIZER]: Yes, Judge. But both of these -- both of
10 these men; Bashir and the name of the number-two guy escapes me
11 at the moment. They're both indicted in the ICC. The rapid
12 security force was deployed a week ago, and they shot 100 or
13 more people in the streets of -- of Kurtun.

14 All of that apparatus appears to still be there.
15 Nothing -- and there is no evidence before the Commission that
16 the rapid security force -- you have evidence that that's still
17 in place. [REDACTED]

18 What's happened is you've had a series of generals, deposed the
19 generals, and who knows whether Bashir -- Bashir is even out of
20 power, technically. He could just be sitting in a -- in a house
21 somewhere with these puppet guys up in front of him. All of
22 that is relevant, Judge, to whether the government has taken
23 even minimal steps besides putting something on the Military
24 Commission website to give Mr. Qosi notice.

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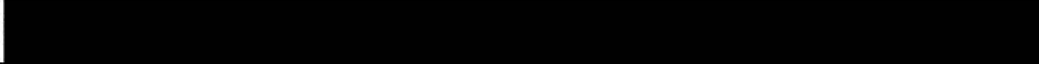
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1 MJ [CAPT LUKEN]: And that's not lost on me. And so -- and
2 that will be addressed, so thank you, Defense. I understand.

3 DC [CAPT MIZER]: Yes, sir.

4 ATC [LCDR ROMAN]: Your Honor, if I might just correct the
5 record a little bit; like, what Captain Mizer here ----

6 MJ [CAPT LUKEN]: Counsel, to be quite honest with you --
7 out of professional curtesy, I'll give it to you, but I'm really
8 not too pleased right now with your position; but go ahead.

9 ATC [LCDR ROMAN]: Your Honor, the Commission does have
10 testimony that Lieutenant Colonel Corcoran worked with his
11 partners, worked with their counter patriots -- counterparts in
12 the Sudanese government. That was clear in the first session.
13 It's unreasonable to state hypotheticals that someone, like
14 Lieutenant Colonel Corcoran, who was on the ground and
15 understood the threat and the risks involved, to think about any
16 kind of 

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18 MJ [CAPT LUKEN]: Counsel, I want to focus on what this
19 issue is about, which is about you, the government -- excuse me,
20 the government turning something over or not turning something
21 that it should or should not have. This whole argument about
22 what was on the ground, notice; that goes to the question that
23 I've been banging around in my head that I anticipate I'll hear
24 a little bit of argument on today. I don't want to get into

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1 that. The facts that were presented are the facts that were
2 presented. Don't -- focus on the document.

3 ATC [LCDR ROMAN]: Well, and in focusing on the ----

4 MJ [CAPT LUKEN]: What is it -- what is it that you wanted
5 to correct?

6 ATC [LCDR ROMAN]: So focusing on the document that --

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13 So yes, it is cumulative. They are not in a
14 substantially different position due to this cable that they say
15 they don't have. It is not -- it is cumulative, and it is
16 stale. So the more accurate information has been given. As you
17 know, sir, all of these ----

18 MJ [CAPT LUKEN]: Counsel, I've heard enough. Thank you.

19 ATC [LCDR ROMAN]: Yes, sir.

20 MJ [CAPT LUKEN]: Thank you. I hear your argument as
21 you're in the position of mitigating at this stage. It doesn't
22 address -- you are not addressing, have not addressed the
23 question of whether you had this document and you just simply
24 did not turn it over, because either: A, you didn't know about

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1 it, which probably where I thought we were going to be going
2 with this; or B, you made a conscious decision not to do it.
3 And you can't answer that; either one of those two questions.
4 So as far as I am concerned, I'll make my own finding based on
5 the evidence I have. So thank you.

6 ATC [LCDR ROMAN]: Yes, sir.

7 TC [CDR TREST]: Your Honor, can I please note one thing
8 for the government?

9 MJ [CAPT LUKEN]: Sure.

10 TC [CDR TREST]: That this -- the defense filed this notice
11 on the eve before we were here -- to be here. So we haven't had
12 time. We were here all day, yesterday.

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] So although we may not have that exact form, we
17 have to look further to see if we have the information contained
18 in a different form in something else. That's why it's not as
19 clear as just doing a word search to see if we have it. It
20 takes -- to be honest and to be giving you a truthful answer, we
21 would have to take more time to really dig through all of the
22 [REDACTED]. And that's why we -- it does not
23 look like a familiar document, but we cannot say with certainty
24 that over the last 2 months we haven't seen it. It's just not

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1 something that comes to mind, and that's why we would need more
2 time to answer that question.

3 MJ [CAPT LUKEN]: Okay, I understand. And that's what I'm
4 looking for. I'm looking for a good-faith proffer of whether
5 there was a conscious decision to give it or not give it. I
6 understand there's troves of discovery of documents. I
7 understand that. I can appreciate that. But a simple question
8 of, to your knowledge, is this something that you had and you
9 consciously decided not to give for whatever reason? Or is this
10 simply, yep, here is another document that relates to this
11 reporting and there's like ten others, probably,

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15 TC [CDR TREST]: Yes, sir, and we take notes on things that
16 -- we make conscious decisions of whether we're going to do
17 something or not and why we're doing it. But we can't always
18 have those notes with us.

19 MJ [CAPT LUKEN]: All right.

20 TC [CDR TREST]: And that's -- we have not had time to go
21 back and access those notes in the -- in the short amount of
22 time that we had to answer this question.

23 MJ [CAPT LUKEN]: All right.

24 Last chance, Defense. I want to move on here.

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1 DC [CAPT MIZER]: Understood, Judge. One dispute on fact,

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 MJ [CAPT LUKEN]: All right.

7 DC [CAPT MIZER]: Second, Judge, we provided this cable
8 within the briefing schedule that was provided to us on Monday.
9 They've had the cable since Monday. I realize that they may
10 need more time, Judge. That's entirely reasonable, but at the
11 end of that, if this wasn't provided, we would be seeking a
12 remedy. The remedy that we have sought before is striking
13 Special Agent Hodgson's testimony, and you can still do that
14 after the fact.

15 MJ [CAPT LUKEN]: I understand.

16 All right, one thing, Defense, I'm going to put you a
17 little bit on the fire, all right? Here I'm the one who said I
18 want to kind of move on, and I'm bringing something up.

19 Talk me out of thinking that this was a little bit of
20 a "gotcha" on your side.

21 DC [CAPT MIZER]: Fair enough, Judge.

22 MJ [CAPT LUKEN]: Because it appears, when I first saw the
23 writing, in light of the amount of discovery that is passed back
24 and forth, it seemed like this was a little of a "gotcha," which

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1 I have a lot of respect for you professionally and for your team
2 professionally, and I'd hope this -- and I said this in the
3 previous 802's. I'm not looking for gamesmanship, and this has
4 a little bit of a smell to that. So walk, talk me out of that.

5 DC [CAPT MIZER]: Understood, Judge. And I can represent
6 to the court that I've known about the existence of this cable
7 for about a week. I was with Ms. Morgan down in Guantanamo last
8 week. Ms. McCormick alerted me to the -- to the existence of
9 this cable. We don't have working office spaces at the moment
10 in Guantanamo. We filed this on Monday, when we got back to
11 Washington, D.C. I believe -- and here's the other piece of it
12 too, Judge. We didn't get discovery until the 31st of May. So
13 then you've got to line up ----

14 MJ [CAPT LUKEN]: And some of that was on the court's
15 fault; so my access to SIPR.

16 DC [CAPT MIZER]: I understand, Judge. I'm not blaming the
17 government for that, and I'm not blaming Your Honor. But we
18 don't know what we don't know, which is why you're typically, at
19 least in federal court, invited into that 505 process. So I can
20 tell you, "Hey, I've actually seen this cable before, and the
21 judge said I can't use it." So, you know, there's an issue of
22 us not knowing exactly what's there and then ----

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1 MJ [CAPT LUKEN]: Fair enough. And I appreciate you
2 clearing it up, because it had a little bit of a stink to a
3 "gotcha" or whatever.

4 DC [CAPT MIZER]: And I can assure you that's not the case,
5 Judge.

6 MJ [CAPT LUKEN]: Okay. Thank you very much, and I'll take
7 that as your word. So thank you very much.

8 Okay. At this point, I'm going to take it under
9 advisement. I'm going to go ahead and listen to the evidence,
10 and then, Government, I would like to get a response from you on
11 this particular matter. You know the issue that, obviously, I
12 have most concern about. I believe and hope that we are acting
13 in good faith and doing the best we can. But I want to make
14 sure -- I want to know whether this was a conscious decision not
15 to turn over this cable. I got it that there's a lot of
16 mitigating factors as to whether the information was already
17 provided through other means and et cetera, but I want to know
18 about this particular cable. So please do that in your
19 response. I will give you until the 20th to respond.

20 Is that sufficient time?

21 ATC [LCDR ROMAN]: Yes, Your Honor.

22 MJ [CAPT LUKEN]: All right, thank you very much. All
23 right that resolves the issue for now.

24 Government, do you want to call your witness?

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1 TC [CDR TREST]: Yes, Your Honor.

2 The government calls Special Agent Hodgson.

3 SPECIAL AGENT JIM HODGSON, civilian, was reminded of his
4 previous oath, took the witness stand, and testified as follows:

5 DIRECT EXAMINATION

6 Questions by the Trial Counsel [CDR TREST]:

7 Q. Special Agent Hodgson, yesterday we discussed -- excuse
8 me, the investigative steps that you took back in 2017, [REDACTED]
9 [REDACTED] Can you
10 discuss other investigative steps that you took that you
11 couldn't talk about yesterday in open session?

12 A. Yes, ma'am. Basically ----

13 Q. Could you please just tell the judge?

14 A. Oh, Yes.

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 Some of the search parameters were: Ibrahim al

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1 Qosi, Ibrahim Ahmed al Qosi, Khubayb al Sudani, Yemen,
2 terrorism, AQAP, al Qaeda in the Arabian Peninsula, and, you
3 know, searches like that. And through that process, I found
4 some of the additional media that we discussed yesterday. And
5 somewhere along that point, we probably had about a 4-week
6 parameter when I officially got involved in the investigative
7 portion to when the original DuBay hearing was going to be held
8 on 12 July of 2017.

9 And at that point, prosecution said, "Well, we've been
10 notified that the aspect [REDACTED]
11 [REDACTED] So with that being said, Jim, we need you to see
12 if you can kind of run a parallel search," if you will, sir.

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1 Q. Special Agent Hodgson, just to clarify, so can you
2 describe for the judge [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 MJ [CAPT LUKEN]: Not lately.

6 A. Well basically, sir, as I said, [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 MJ [CAPT LUKEN]: I'm sorry, I'm going to interrupt you
10 here; is that SIPR or NIPR?

11 A. NIPR.

12 MJ [CAPT LUKEN]: Okay.

13 A. But what you'll see, sir, [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

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21 [REDACTED]

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23 [REDACTED]

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1 A. Well,

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10 Q. And so when you got informed that we can't -- that that

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16 A. Correct.

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19 Q. Okay.

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23 A. Yes, ma'am.

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1 Q. And so [REDACTED]

2 [REDACTED]

3 A. It's only [REDACTED]

4 Q. Okay, [REDACTED]

5 A. Yes. [REDACTED]

6 Q. Okay. Can anyone access it?

7 A. You have to be [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 Q. Okay. Is there [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 A. Yes, I once again [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 Q. And those were the [REDACTED]

18 [REDACTED]

19 A. Yes, [REDACTED]

20 Q. [REDACTED]

21 [REDACTED]

22 A. No.

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1 Q. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 A. No, ma'am.

5 TC [CDR TREST]: I have no further questions at this time,
6 Your Honor.

7 MJ [CAPT LUKEN]: All right, thank you.

8 DC [CAPT MIZER]: One moment, Judge, please.

9 [CAPT Mizer conferred with Ms. Morgan and Ms. McCormick.]

10 MJ [CAPT LUKEN]: All right, thank you.

11 DC [CAPT MIZER]: One moment, Judge, please.

12 MJ [CAPT LUKEN]: Yeah, sure.

13 [Defense Counsel conferred with his team.]

14 CROSS-EXAMINATION

15 Questions by the Defense Counsel [CAPT MIZER]:

16 DC [CAPT MIZER]: Thank you, Judge. I'm sorry.

17 Good morning, Agent Hodgson.

18 WIT [SA HODGSON]: Good morning, sir.

19 Q. I want to talk [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 A. As I recall, [REDACTED]

23 [REDACTED]

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1 Q. I see. [REDACTED]

2 [REDACTED]

3 A. That sounds familiar, yes, sir.

4 Q. [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 A. I believe so, sir.

8 Q. [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 A. If you say so, sir.

12 Q. Okay. [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 A. If you say so, sir.

16 Q. Okay. I asked you yesterday. [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 A. No subpoenas, sir.

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1 Q. Okay. Did you make any investigative effort, Agent

2 Hodgson,

3

4 A. No investigative efforts to

but,

5

6

7 Q. Same thing as on the ----

8 A.

9 Q.

10

11

12 A. Right, and this

13

14

15

16 Q. Okay. You would agree with me though

17

18

19 Is that accurate?

20 A. I mean, it's a possibility, but as I said, it seemed to

21 be a match or matched as far as the dates. You know, I gave the

22

23

24 Q. Okay.

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1 A. ---- pinging it.

2 Q. [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 TC [CDR TREST]: Your Honor, the government just asks for a
6 Bates number of what that ----

7 DC [CAPT MIZER]: I'm sorry; Bates [REDACTED], and I can wait for a
8 second, ----

9 TC [CDR TREST]: Thank you.

10 DC [CAPT MIZER]: ---- Judge, while the government gets
11 that.

12 [Pause.]

13 Q. [REDACTED]

14 [REDACTED]

15 Does that sound accurate, Agent Hodgson?

16 A. If you say so, sir.

17 Q. [REDACTED]

18 [REDACTED]

19 Is that -- is that accurate?

20 A. Right, he post [REDACTED]

21 [REDACTED]

22 Q. Okay. With respect to [REDACTED]

23 [REDACTED]

24 [REDACTED]

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1 Does that sound accurate?

2 A. If you say so, sir.

3 Q. Okay.

4

5 Does that sound accurate?

6 A. Yes.

7 Q. Okay.

8 Your Honor, I have no further questions.

9 MJ [CAPT LUKEN]: Any redirect?

10 TC [CDR TREST]: No, Your Honor.

11 **EXAMINATION BY THE COURT-MARTIAL**

12 **Questions by the military judge [CAPT LUKEN]:**

13 Q. I'm going to shift gears up on you a little bit.

14 The AQAP Shura Council, there's been discussion about
15 it, but based on your training and experience, what is that?

16 And what is their mission or interest? What do they do?

17 A. Um, based on my experience, Shura -- a Shura Council
18 would be like a, you know, a subcommittee. I mean, if you think
19 of like the Emir as the commander of an organization and your
20 Shura Council are your -- are your deputies; your executive
21 officer, maybe your DCO; things of that nature. And in this
22 instance, you know, they're advising the Emir, and also, you
23 know, they're figureheads. Three of the four people that we
24 discussed yesterday are part of the Shura Council. All had

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1 experience as part of al Qaeda, and all had been in Afghanistan
2 serving under Bin Laden.

3 So, you know, senior-level leaders, advisors to the
4 Emir, advisors to the commander, and in the propaganda that I've
5 found, they're also being interviewed and speaking to the would-
6 be recruit in the propaganda. And, you know, "This is who we
7 are. These are the missions. This is the cause. This is the
8 platform. This is the philosophy."

9 Q. All right, thank you.

10

11

12 DC [CAPT MIZER]: Judge, I would object at this point. I
13 don't think that there's any affirmative evidence in the record
14 dealing with those summaries.

15 MJ [CAPT LUKEN]: Say that one more time?

16 DC [CAPT MIZER]: Judge, I don't think that there's
17 evidence in the record. The government didn't elicit that
18 testimony from Agent Hodgson, and we didn't cross him on it;
19 what's in the [REDACTED] Judge.

20 MJ [CAPT LUKEN]: Okay, thank you.

21 [Pause.]

22 Q. What is the [REDACTED]

23 DC [CAPT MIZER]: Same objection, Judge.

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1 MJ [CAPT LUKEN]: Yes, Your Honor -- excuse me, "Your
2 Honor." Yes, I understand.

3 [REDACTED]
4 DC [CAPT MIZER]: I don't think that
5 [REDACTED]

6 MJ [CAPT LUKEN]: It was discussed yesterday, from my
7 recollection of the testimony.

8 DC [CAPT MIZER]: I don't believe that it is in any of the
9 videos, Judge ----

10 MJ [CAPT LUKEN]: Okay.

11 DC [CAPT MIZER]: [REDACTED]

12 MJ [CAPT LUKEN]: All right. I understand your objection.
13 Thank you.

14 DC [CAPT MIZER]: Aye, sir.

15 Q. What is [REDACTED]

16 A. The only [REDACTED] reference I'm recalling at this
17 point, sir, is from the blessing of the solid edifice, al Qosi's
18 The Al-Murabitun Battalion combining with al Qaeda in the
19 Islamic Madrid.

20 MJ [CAPT LUKEN]: Okay. Thank you.

21 All right, any additional questions, Government?

22 TC [CDR TREST]: No, Your Honor.

23 MJ [CAPT LUKEN]: Defense?

24 DC [CAPT MIZER]: No, Judge.

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1 MJ [CAPT LUKEN]: All right, thank you.

2 [The witness was duly warned, temporarily excused, and resumed
3 his seat at the counsel table.]

4 MJ [CAPT LUKEN]: Government, do you have any evidence that
5 you wish to present; additional evidence?

6 TC [CDR TREST]: No, Your Honor.

7 MJ [CAPT LUKEN]: No documentary evidence?

8 TC [CDR TREST]: No, Your Honor, unless there's -- I mean,
9 we would say, Your Honor, that this is your -- this is your
10 call. This is your findings of fact, conclusions of law. So
11 we, again, are presenting our evidence in an open forum. That's
12 where we're presenting the majority of our evidence. We just
13 wanted to present Special Agent Hodgson's testimony to explain
14 where he -- how sourced a lot of that information; if Your Honor
15 wants additional information that we are standing by, Your
16 Honor.

17 But for those reasons and in an effort to keep this as
18 open and transparent per the CMCR's request that we keep this as
19 open and transparent as possible, we have stuck to what's been
20 available in -- in open forum.

21 MJ [CAPT LUKEN]: I understand.

22 TC [CDR TREST]: And so we have no further evidence at this
23 time.

24 MJ [CAPT LUKEN]: All right. Thank you.

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1 Defense, any additional evidence?

2 DC [MS. MCCORMICK]: Your Honor, if we could have a moment,
3 we've got some documentary evidence that we have marked.

4 MJ [CAPT LUKEN]: Okay, one, before you do that, I want to
5 make sure whatever documentary evidence you're offering -- and,
6 apologies, my notes -- I don't have my notes in front of me, are
7 documents that we discussed in the closed hearing previously
8 held.

9 DC [MS. MCCORMICK]: They are, Your Honor.

10 MJ [CAPT LUKEN]: Okay, so they've been previously cleared,
11 with the exception of the new one?

12 DC [MS. MCCORMICK]: With the exception of the new one that
13 we presented with our motion.

14 MJ [CAPT LUKEN]: Ah.

15 DC [MS. MCCORMICK]: Perhaps Captain Mizer should address
16 it, since ----

17 DC [CAPT MIZER]: Judge, understanding that that's still a
18 live issue, it would probably make sense, if we can, and I'd
19 prefer that the classification experts, move that -- I mean, the
20 cable's attached to a motion, so I don't know that we need to
21 address ----

22 MJ [CAPT LUKEN]: Add another ----

23 DC [CAPT MIZER]: ---- address that.

24 MJ [CAPT LUKEN]: ---- add another document?

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1 Government, what's your position as to the procedural
2 as to 505 for this particular document?

3 TC [CDR TREST]: The government would -- believes that it's
4 outside of the procedure, that it should have been noticed,
5 because, obviously, it's -- the -- it's gotten out in front of
6 the process. And that's why we have this 505 process, in that
7 it wasn't properly noticed. The government hasn't been taking -
8 - been able to take the appropriate steps and work through this
9 information, Your Honor. And I think that also goes back to why
10 we can't answer the questions earlier.

11 MJ [CAPT LUKEN]: So that's one position to take.

12 TC [CDR TREST]: Yes, Your Honor.

13 MJ [CAPT LUKEN]: But while I'm still under advisement of
14 the motion, I think, concerning the timeline that we had of
15 defense identifying this document. It was after the 505 by
16 their proffer, which I'm taking their word for; after the 505
17 session that we held. And there seems to be somewhat of an
18 arguable, outstanding issue of whether there was a discovery
19 violation here. The government isn't seeking to mitigate that
20 discovery violation by trying to keep the defense from
21 presenting this evidence.

22 Is that the ----

23 TC [CDR TREST]: No, the government is not ----

24 MJ [CAPT LUKEN]: ---- the route we want to go?

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1 TC [CDR TREST]: ---- trying to mitigate that at all, Your
2 Honor.

3 MJ [CAPT LUKEN]: I know you're not trying to mitigate
4 that.

5 TC [CDR TREST]: No, I mean, the government does not
6 believe there was a violation, but this is part of the
7 confusion. When we're talking about this kind of information,
8 it's not like a regular document. There's so many reasons why
9 it takes the notice: One, to give our partners who own this
10 information time to review it; but also, two, like I said,
11 intelligence reporting, multiple sources, it's not always
12 apparent who -- where this is coming from, if we've already
13 worked through this or not. And that's why the time is needed
14 and the notice is needed.

15 So the government is presenting a thoughtful, accurate
16 position that -- and we've been clear about this, Your Honor,
17 from the beginning, that we can't turn things around
18 immediately, because of the multiple layers and steps it takes
19 to make sure our government secrets and interests are properly
20 protected.

21 MJ [CAPT LUKEN]: Have you had a chance to review this
22 document?

23 TC [CDR TREST]: The one that was attached.

24 MJ [CAPT LUKEN]: Yes.

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1 TC [CDR TREST]: Yes, Your Honor. Now, I have, and I'm --
2 but I can tell you I have not had a chance in the timeline to
3 sit down in any meaningful manner, except to say, "Oh, my gosh,
4 we got this filing." Like, literally, that's all I've had time
5 to do. And so that's why -- that's why we haven't had time to
6 formulate a better -- and that's why notice is important.
7 Because we have not had time, because we don't just represent
8 the people sitting at this table. We represent the big
9 government. We understand our obligations, and we are very
10 purposeful understanding our obligations; but also understanding
11 the balance that we have to do with the owners of this
12 information in trying to make sure we have an appropriate and
13 truthful answer of how we've handled this information.

14 And the notice gives us time to work that out. When
15 we circumvent the process, it is a vouching moment for the
16 government, and we are caught with non-answers, because we
17 haven't been able to really go back and review things. And we
18 do take good notes, but those aren't things we can just carry
19 with us. Those are things we have to keep in the appropriate
20 spaces. It takes time, Your Honor. That's all I can ----

21 MJ [CAPT LUKEN]: Okay.

22 TC [CDR TREST]: That's all I can express to you, and
23 that's why we have -- the Congress has made a specific process
24 in which we deal with this information.

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1 And, Your Honor, may I have one moment?

2 MJ [CAPT LUKEN]: Captain Mizer, you were about to say
3 something?

4 DC [CAPT MIZER]: Judge, your staff will be aware that we
5 requested an AE number for that notice on Monday.

6 MJ [CAPT LUKEN]: Correct.

7 DC [CAPT MIZER]: We didn't file it, because we were told
8 yesterday that we have the document. I went back to my office
9 last night. I sent the government an email. I understand it
10 was late. They weren't there; couldn't respond. I don't want
11 "gotcha" moments, Judge.

12 MJ [CAPT LUKEN]: I know.

13 DC [CAPT MIZER]: I was in my office ----

14 MJ [CAPT LUKEN]: This is where I'm at. So this is my
15 frustration right now. I'm trying to get this hearing finished
16 in a timely manner. This document, it is what it is. I
17 understand the government's position of, "Hey, we have the
18 information somewhere else." Defense saying, "Yeah, but it
19 still helps us nonetheless."

20 So I've got to make my ruling on that. Ultimately, if
21 I come down for the defense, do I consider all of the evidence
22 in light of the fact that there was an arguable discovery
23 violation? That's one step I could take. I could turn around,
24 go through the full thing and say, "Hey, Special Agent Hodgson,

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1 sorry, I'm not going to consider any of his testimony." I'm
2 sitting here right now with a document that, arguably, is
3 similar to the other information.

4 And the government's saying, "Oh, we want to go
5 through process." I just am failing to see why you're not
6 mitigating this whole issue by -- so I got it, Government. You
7 object. I can't -- I don't have the authority to overrule and
8 say, "Sorry, they get to do it," because the rule says I don't
9 have that authority. Instead, I turn and go, "No, I make this
10 finding," and if not then I can abate, or, actually, turn around
11 and take other steps. And I am sure I could abate, since it's
12 the appellate court asking me to do this DuBay hearing.

13 So I'm just pretty frustrated right now that I'm in
14 this spot that what seems relatively an easy process, and I'm
15 being told the government's position is they want to, rather
16 than move forward on this, they want to take other steps, so.

17 TC [CDR TREST]: I'm sorry, Your Honor. It's not that
18 we're not moving forward. We're just explaining that we
19 understand. Like we're talking about, we've moved past the
20 procedural process. But we need to emphasize the procedural
21 process is in place to assist us in moving forward in a ----

22 MJ [CAPT LUKEN]: Fair.

23 TC [CDR TREST]: ---- timely and intelligent manner.

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1 MJ [CAPT LUKEN]: All right, Government. I'll let you do
2 that; do your process. I will tell you now, though, I'm sitting
3 in a closed session. I have a protective order out, and it
4 seems to me that this, the material, is already with the
5 defense, and it can be protected. If there's some government
6 agency or government that wants to say, "No, we can't use this
7 for purpose of this DuBay," roger that. And then I'm going to
8 consider that for my decision as to whether it was a discovery
9 violation and give an appropriate remedy at that stage.

10 So that's where we're at. So I'll stand by until the
11 government tells me what they're going to do with this document.

12 TC [CDR TREST]: So you're looking for direction, sir, as
13 to what the government, if it's permissibly used in the DuBay as
14 in part of the -- in the filing? I'm sorry, I'm -- what is the
15 specific direction? Is it can it be used in the DuBay for the
16 DuBay to consider?

17 MJ [CAPT LUKEN]: Yes, can it be?

18 TC [CDR TREST]: Okay. One moment, Your Honor.

19 MJ [CAPT LUKEN]: But, evidently, you have to go to some
20 other agency is what you're telling me.

21 **[Trial Counsel conferred with her team.]**

22 TC [CDR TREST]: So, sir, in our brief discussion, and
23 we'll take this that they said it's already out there. So for
24 the purpose of this, then I think we can go forward. My point

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1 is that when you're asking us then questions about what have you
2 done with this? Have you discovered it? Did you make
3 intentions?

4 MJ [CAPT LUKEN]: That's separate.

5 TC [CDR TREST]: The purpose of the notice ----

6 MJ [CAPT LUKEN]: That's separate.

7 TC [CDR TREST]: Yes. And so we ----

8 MJ [CAPT LUKEN]: Defense wants me to consider this
9 document for this DuBay.

10 TC [CDR TREST]: Yes. We believe we can -- we can. It's
11 already out here. They've been alerted, and they said it's
12 already out there. Just consider it. So that part, we can go
13 forward.

14 MJ [CAPT LUKEN]: So under Appellate ----

15 TC [CDR TREST]: My point -- yes.

16 MJ [CAPT LUKEN]: So under 505(h) ----

17 TC [CDR TREST]: Yes, sir.

18 MJ [CAPT LUKEN]: ---- I can make a finding of the fact
19 that there is, arguably, relevance inadmissible for the
20 classified information with the protections of the protective
21 order and as considering it in a closed session.

22 TC [CDR TREST]: So we would object to relevance, Your
23 Honor. But, yes, you can make that determination.

24 MJ [CAPT LUKEN]: Very well.

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1 All right, Captain Mizer, therefore, I will go ahead
2 and consider that document. Let's go have it marked and provide
3 it appropriately.

4 DC [CAPT MIZER]: Aye, sir.

5 MJ [CAPT LUKEN]: All right, thank you.

6 Anything else?

7 DC [CAPT MIZER]: We have three documents we have to have

8 ----

9 TC [CDR TREST]: So this is just marked as part of their
10 attachment to their discovery motion, Your Honor, or is that --
11 are they moving it into evidence? That's what I'm trying to ---
12 -

13 MJ [CAPT LUKEN]: What we'll do is I will consider it.
14 It's already marked, and rather than add it to another, let me
15 ask this:

16 Captain Mizer, what would like me to do? How would
17 you like to do this procedurally?

18 DC [CAPT MIZER]: Judge, we can submit the notice later
19 today, if you wish, and we would like the Commission to consider
20 this on its substance.

21 MJ [CAPT LUKEN]: Very well. That's what I'll do.

22 DC [CAPT MIZER]: And then Judge, we have --

23 **[Defense Counsel conferred with his team.]**

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1 DC [CAPT MIZER]: And then, Judge, we have three other
2 documents. For the record, those are Bates 161, 81 -- excuse
3 me, Judge, 76 through 79, 81 through 87, and 161 through 167.
4 They're all classified at the SECRET, I believe, NOFORN level,
5 Judge.

6 MJ [CAPT LUKEN]: Are we going to mark these separately or
7 as one exhibit?

8 DC [CAPT MIZER]: I'll defer to you and your court
9 reporters, Judge.

10 MJ [CAPT LUKEN]: All right, we're going to do them
11 separately.

12 Captain Mizer, if you'll bring them to me. Let me
13 just take a look at them real quick, so I can kind of --
14 **[Defense Counsel did as directed.]**

15 MJ [CAPT LUKEN]: Okay, the first document is 7 pages.
16 That's Bates stamps 161 through 167.

17 DC [CAPT MIZER]: Judge, all of these are what we will
18 refer to in the open session per the government's guidance as
19 "cables", [REDACTED]

20 [REDACTED]

21 MJ [CAPT LUKEN]: Understood. Stand by one second.

22 DC [CAPT MIZER]: Aye, sir.

23 MJ [CAPT LUKEN]: So that's the first document, which will
24 be number --

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1 [Pause.]

2 MJ [CAPT LUKEN]: Okay, this will be number 40. All right,
3 then the second document, Bates stamps 81 through 87 --

4 [The military judge conferred with the court reporter.]

5 MJ [CAPT LUKEN]: This will be 40A. And the next one will
6 be -- 76 through 79 will be 40B, as in Bravo.

7 So to recap, just so I'm clear, because I know I threw
8 out a different number there; it's 40, 40A, and 40B.

9 DC [CAPT MIZER]: The Bates numbers, Judge, if I could;
10 which one's 40?

11 MJ [CAPT LUKEN]: 161.

12 DC [CAPT MIZER]: Okay. 40A?

13 TC [CDR TREST]: 81.

14 DC [CAPT MIZER]: I've got the last one, Judge.

15 MJ [CAPT LUKEN]: Excellent.

16 Any objection to these, Government?

17 TC [CDR TREST]: Yes, Your Honor. We object to 40A and --
18 and 40.

19 MJ [CAPT LUKEN]: All right, let's do this. With 40A, what
20 is your objection?

21 TC [CDR TREST]: Well, it's the same objection for 40 and
22 for 40A, [REDACTED] It
23 has nothing to do with what Mr. al Qosi knew. There's no --
24 there's nothing here that talks about his intent, anything that

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1 was communicated to him. This is, literally, [REDACTED]
2 [REDACTED] So it's just
3 not relevant to whether Mr. al Qosi isn't answering any of those
4 questions; whether he's an UAEB, or whether he could be made to
5 respond.

6 MJ [CAPT LUKEN]: Okay. Defense, what are you offering
7 these for?

8 DC [CAPT MIZER]: Judge, I agree that it's not relevant to
9 the UAEB question, but it's absolutely relevant to whether he
10 could be made to respond. If the expectation of big G was that
11 he would never have to respond again, [REDACTED]
12 [REDACTED] we think that that
13 goes directly to the question.

14 And, Judge, with respect to 40A, I mean, it's --
15 that's one of the big documents, you know? [REDACTED]

16 [REDACTED]
17 [REDACTED] He's been to the extremist rehabilitation center for
18 a year. And then, interestingly, at the end that the
19 [REDACTED]
20 [REDACTED] that affirmed that should Qosi
21 violate the terms of his plea agreement and should a U.S. judge
22 order enforcement of the terms of the agreement by revoking the
23 balance of his suspended sentence, [REDACTED]

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1 the legal capacity and willingness to work with the U.S.
2 prosecutor.

3 You've got no evidence before you, Judge, the

4

5 [REDACTED] And all of this, again, happened after
6 Mr. Qosi's sentence had been suspended. So we believe that
7 these are relevant, Judge. The terms between the government and
8 what steps the government has taken to actually get ahold of Mr.
9 Qosi; again to the notice question and also to the second
10 question specified by the court.

11 MJ [CAPT LUKEN]: You'll notice -- I note that these
12 documents though are dated back in 2012, 2013.

13 DC [CAPT MIZER]: And that's when he was released, Judge.
14 And it's the expectation [REDACTED] when he was
15 released. [REDACTED]

16

17

18

19

20

21 MJ [CAPT LUKEN]: All right. I understand.

22 The objection is overruled, given its due weight.

23 Thank you.

24 Anything further?

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1 DC [MS. MCCORMICK]: Your Honor, we have some unclassified
2 documents to admit into evidence.

3 MJ [CAPT LUKEN]: We'll do that in the open.

4 DC [MS. MCCORMICK]: Open session?

5 MJ [CAPT LUKEN]: We'll come back in as an open session. I
6 want to try to limit this as much as I can.

7 DC [MS. MCCORMICK]: Part of what we talked about doing,
8 you were going to allow us to do a summary of the evidence on AE
9 009. That part needs to be probably done in a closed session.

10 MJ [CAPT LUKEN]: Okay.

11 DC [MS. MCCORMICK]: Because I want to comment on the
12 classified evidence.

13 MJ [CAPT LUKEN]: I'm sorry, say one more time?

14 DC [MS. MCCORMICK]: I want to comment on the classified
15 evidence in the argument.

16 MJ [CAPT LUKEN]: Government?

17 TC [CDR TREST]: Your Honor, there's been no classified
18 evidence offered. The only -- it's only been the testimony of
19 the steps he took, but not -- there's no actual documentation,
20 documents, that's been offered that's classified, Your Honor.

21 MJ [CAPT LUKEN]: They were just handed -- I think we just
22 got handed some documents that were classified.

23 Is that what you were going to refer to?

24 DC [MS. MCCORMICK]: Yes, Your Honor.

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1 MJ [CAPT LUKEN]: Yeah, and so that's what defense wants to
2 do is they want in their argument for 009 to comment on the
3 evidence that was just presented so that they can present
4 argument in a classified format; limited to that.

5 TC [MS. TREST]: Your Honor, is it easier to just -- well,
6 since we're closed, since it takes time to go back and forth, to
7 just have argument on that piece now while we're closed, and
8 then ----

9 MJ [CAPT LUKEN]: That was my plan until everyone started
10 talking.

11 TC [CDR TREST]: I will sit down, Your Honor.

12 MJ [CAPT LUKEN]: Thank you.

13 All right, parties, as to your summaries, please, I
14 invite you to keep it short. I'll give you a few minutes if you
15 want to provide summary argument as to anything that's
16 classified for the Commission's consideration.

17 Government, do you have anything in particular you
18 want to comment on? Again, keeping it focused on ----

19 TC [CDR TREST]: Yeah.

20 MJ [CAPT LUKEN]: ---- classified.

21 TC [CDR TREST]: Yes, Your Honor.

22 Your Honor, we're going to make most of our argument
23 in the open session. We would just note that the evidence is
24 clear that he has forfeited, when we go to the first question of

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1 whether he -- we can go forward without him being here, the --

2 Mr. -- Special Agent Hodgson's

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10 And to keep this focused, when we're looking at the
11 validity or the authenticity [REDACTED], we have, obviously,
12 the evidence that we've put out in the open forum. But what
13 Special Agent Hodgson was able to do is [REDACTED]

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17 And that is something that you should weigh, Your
18 Honor, in looking to assess his actions. And understanding
19 we're going to go more into argument about how his actions have
20 been knowledgeable and that they forfeited any right that he's
21 had to be present. And when you've forfeited your right to be
22 present, we can go forward. And so we'll ask you to table that
23 thought. And we'll go -- and I'll flush it out more in open
24 forum, but that his actions have basically -- we would say,

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1 "waived," because he knows what he's doing, but at a minimum,
2 forfeited his right to be present here. And then in going to

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11 And, finally, he cannot be made to respond because as
12 -- was we've -- if we're just talking classified, his

13 [REDACTED] And so he's
14 actively -- he knows what he's doing, and that he's in part of
15 the propaganda. [REDACTED]

16 handles that, frankly, have Arabic-sounding names. Do we know
17 who exactly they're from? No, we don't. That is one piece.
18 Give it the weight you will, Your Honor, but it's one piece that
19 the U.S. government has collected and has thought as relevant.
20 But then when you also look at the substance of what their --

21 [REDACTED] which is
22 what we have in our open forum; the substance is of recruitment,
23 of spreading ideology, of showing Mr. al Qosi as being part of
24 al Qaida in the Arabian Peninsula. And, again, we'll argue in

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1 open court that AQAP is merely just an affiliate or a subsidiary
2 of AQ - it's al Qaeda in a geographic-specific location, meaning
3 Yemen.

4 And why that's important for the need to respond is
5 because that's where he is. [REDACTED] this
6 propaganda, as recent as January of 2019. And that's in our
7 open -- that's in T -- that's in Attachment 9, and we're going
8 to talk about that more in the open argument. So that's where
9 he is. When we're trying to respond to the USCMCR about can he
10 be made to respond, the answer is no, because he is in Yemen
11 making AQAP videos regarding attacking the United States. And
12 specifically, the last few he made in the end of 2018 and 2019,
13 is about how to evade being captured or targeted by the United
14 States. And this is open, Your Honor. You'll see this when you
15 watch the video. [REDACTED]

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22 Again, this is a low threshold. This is preponderance
23 of the evidence. We would argue it's not beyond a reasonable
24 doubt. This is more likely than not. The government did not

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1 and was not tasked to by the CMCR to run to ground the exact
2 location and bring him to respond. It was just asking the
3 question can he be made. Is he in the custody or control? It
4 was not -- they did not task the U.S. government to go find him
5 and bring him to respond, to be clear. And so Special Agent
6 Hodgson was not under a duty to have to go track down who that
7 [REDACTED] and see if he could find the camp or the source
8 in Yemen. That was outside the scope of what the CMCR asked
9 from the government.

10 And so the government submits to you we have completed
11 and accomplished gathering that information for Your Honor to
12 consider, and that it's clear, based on the evidence that we
13 have gathered to keep this most open that Mr. al Qosi cannot be
14 made to respond.

15 MJ [CAPT LUKEN]: Thank you.

16 All right, Defense?

17 DC [MS. MCCORMICK]: Thank you, Your Honor.

18 I would just limit the comments to the closed portion.
19 I do have to respond though to the government. When they
20 described [REDACTED] they haven't put on any evidence that --
21 of where the [REDACTED]. So the part, if it is Mr. al
22 Qosi, that could have been filmed in Sudan. And it's
23 interesting that the only steps that the government took to try
24 and locate him for notice purposes were in Sudan. So some part

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1 of the government must think he's there, or else they wouldn't,
2 surely, [REDACTED]
3 [REDACTED] if they
4 really thought he was in Yemen. So it seems like the evidence
5 that we have is they don't know where he is, but there is a good
6 chance he may be still in Sudan. They don't know.

7 But insofar as the classified evidence, Your Honor,
8 one thing that Mr. Hodgson didn't do was he [REDACTED]
9 [REDACTED]
10 was in the exhibit that we are offering by 505 notice today,
11 [REDACTED] They talked about Lieutenant Colonel
12 Corcoran didn't have that information. The government didn't
13 provide them with any information. The unclassified documents
14 that we're going to present in the open session contain
15 additional information from the record of trial that shows the
16 contact information for the family, and this wasn't presented to
17 anyone [REDACTED] to try and give him notice.

18 And the test is, for the notice and for present, is --
19 I'll just refer back to the argument before. The test is that
20 he has to have reason to know the hearing's going on, and the
21 government has to take reasonably -- steps reasonably calculated
22 to notify him. That's in our briefing. You would think that
23 the government would have given some of this information to the
24 [REDACTED] to try and locate him. And

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1 as far as the issue of whether he can be made to respond, as the
2 evidence that we just presented, the 40, 40A, and 40B
3 demonstrate, [REDACTED] in an informal way,
4 [REDACTED] did as much as they could
5 to promise the U.S. that they could make him available if the
6 court orders that. And he can be made to respond under this
7 expectation.

8 What we have here, Your Honor, is the length of time
9 that has happened has not been Mr. Qosi's fault. The reason for
10 the delay in this appeal is not due to his fault and shouldn't
11 be held against him. The -- since 2013, I first asked the court
12 to docket the case for appeal, and the government has fought
13 that the whole way. And that's why we're here in 2019, and
14 suddenly they can't find him and they're -- in other words, the
15 court or in your findings, it seems unreasonable to then hold
16 that against him; the fact that he can't be found or noticed,
17 because of the chaos in Sudan, especially when the government
18 didn't give critical information [REDACTED]

19 The other thing about the chaos in Sudan that's been
20 made part of the record is that it makes it also dangerous for
21 Mr. Qosi to travel in Sudan, if he is there, and his family to
22 travel. So even if, you know, the government says he waived,
23 because he hasn't kept in contact. Well, you know, it's pretty
24 chaotic in Sudan. Again, we made efforts to try and keep in

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1 contact, but the government has fought that over the years as
2 well.

3 MJ [CAPT LUKEN]: Okay. So these are matters that aren't
4 in evidence for the DuBay hearing. I mean, that's more for the
5 appellate court to consider than my findings here on these
6 rather narrow two questions.

7 DC [MS. MCCORMICK]: Except the -- I'm sorry, Your Honor.
8 And maybe they'll mention this in the open session, but the
9 government has presented the D.C. Circuit's decision in this
10 case about the efforts and whether I have been able to contact
11 him and such. So that may come up later.

12 MJ [CAPT LUKEN]: And I want to keep this to the classified
13 portion.

14 DC [MS. MCCORMICK]: All right. I just have one more
15 comment.

16 Given what the evidence that's in AE 40, the cables,
17 [REDACTED]
18 understanding was upon his release in 2012, there has to be more
19 than just a suspicion that he can't respond. There's no
20 evidence [REDACTED]

21 Indeed, the only evidence before you is [REDACTED]

22 [REDACTED] The government has said that
23 there's been no effort made in that regard. Understandably,
24 there's no court order to find him. But that doesn't mean that

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1 he can't be found, [REDACTED]

2 [REDACTED]

3 That's all we have for now, Your Honor.

4 MJ [CAPT LUKEN]: All right, thank you.

5 All right, any other matters we need to take up in
6 this closed session.

7 Government?

8 TC [CDR TREST]: No, Your Honor.

9 MJ [CAPT LUKEN]: Defense?

10 DC [MS. MCCORMICK]: No, Your Honor.

11 MJ [CAPT LUKEN]: All right. We'll take a recess while we
12 go ahead and transition back into open court.

13 The court's in recess.

14 [The R.M.C. 806 recessed at 1026, 13 June 2019.]

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